SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

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JOHN F. DAVIS, CLERK

October Term, 1968

Nos. 981, 1000, 1001

PILOT FREIGHT CARRIERS, INC.,
Petitioner,

v.

CHARLES W. WALKER,
Respondent.

THE OBSERVER TRANSPORTATION COMPANY,
Petitioner,

v.

DANIEL LEE, ET AL.,
Respondents.

GASTON COUNTY DYEING MACHINE COMPANY,
Petitioner,

v.

MARVIN W. BROWN,
Respondent.

BRIEF IN OPPOSITION TO CERTIORARI

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BRIEF IN OPPOSITION TO CERTIORARI

Question Presented for Review

Was the Court of Appeals for the Fourth Circuit correct in holding that conciliation efforts by the Equal Employment Opportunity Commission (hereinafter referred to as

"the Commission") are not a jurisdictional prerequisite to the institution of a civil action under section 706(e) of the Civil Rights Act of 1964 by a person aggrieved, who has exhausted his administrative remedy?

Statement of the Cases

These three cases are before the Court on petitions for writs of certiorari from the same Court of Appeals; they present the same legal issue with no substantial factual differences. This Brief in Opposition, therefore, covers all three cases. Cf. Rule 23(5) of the Rules of the Supreme Court of the United States.

None of the facts in the cases are in dispute.

No. 981, Pilot Freight Carriers, Inc. v. *Charles W. Walker*

On February 28, 1966, the Respondent, Charles W. Walker, filed with the Commission a charge (amended on March 15, 1966) alleging a violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* The Commission investigated the charge and on July 20, 1966, found reasonable cause to believe that its allegations were true. By letter dated August 5, 1966, the Commission notified the Respondent that due to its heavy workload it had been "impossible to undertake or conclude conciliation," and that he had a right to institute a civil action within thirty days of receipt of the letter. The Respondent commenced this action by filing a complaint in the District Court for the Western District of North Carolina on August 23, 1966. That court dismissed his complaint on January 25, 1968, on the sole ground that an effort to conciliate by the Commission is a jurisdictional prerequisite to the right of a person aggrieved to file a civil action. On October 29, 1968, the Court of Appeals for the Fourth Circuit reversed the District Court.

No. 1000, Gaston County Dyeing Machine Company v. *Marvin W. Brown*

On February 1, 1966, Respondent Brown filed a charge of employment discrimination against Gaston County Dyeing Machine Company with the Commission alleging violation of Title VII of the Civil Rights Act of 1964. The Commission investigated the charge and rendered a decision on May 5, 1966, finding "reasonable cause" to believe the charge to be true. Brown was duly notified of the decision by a letter dated May 12, 1966. By a letter also dated May 12, 1966, the Commission notified him that it had "been impossible to undertake or conclude conciliation efforts" in his case and that he had a right to institute a civil action within 30 days of the receipt of the letter. Brown commenced an action by filing a complaint in the District Court on May 31, 1966.

No. 1001, The Observer Transportation Company v. *Lee, et al.*

Each Respondent herein filed a charge of employment discrimination against The Observer Transportation Company on or about February 28, 1966, alleging a violation of Title VII. By a letter dated May 19, 1966, each was notified by the Commission that the charge was still being processed; that sixty days had elapsed since the filing of the charge; and that he had a right to institute a civil action within 30 days from receipt of the letter. On June 9, 1966, the Commission found reasonable cause to believe that petitioner had violated Title VII. Suit was filed on June 20, 1966, in the District Court.

On March 22, 1968, the District Court dismissed the complaints in No. 1000 (Gaston County Dyeing Machine Co.) and No. 1001 (The Observer Transportation Co.) on the sole ground that an effort at conciliation is a jurisdictional

prerequisite to suit. On November 1, 1968, the Court of Appeals for the Fourth Circuit reversed the dismissals of these complaints.

Argument

The decision of the court below follows the plain language of the statute. The explicit language of section 706(e) of the Act places just two conditions upon the aggrieved person's right to bring suit: that he have filed charges with the Commission in proper form and that he have been notified by the Commission that it has been unable (for whatever reason) to obtain voluntary compliance. As the court below pointed out, "'Unable' is not defined by statute to give it a narrow or special meaning. We think 'unable' means simply unable—and that a commission prevented by lack of appropriations and inadequate staff from attempting persuasion is just as 'unable' to obtain voluntary compliance as a commission frustrated by the recalcitrance of an employer or a union." (Petition No. 981, p. 7a).

Both of the other Circuit Courts of Appeal which have considered the question have reached the same conclusion as the court below. *Dent* v. *St. Louis-San Francisco Ry. Co.*, —— F.2d —— (5th Cir. 1969); *Burrell* v. *Kaiser Aluminum & Chemical Co.*, —— F.2d —— (5th Cir. 1969), reversing 287 F. Supp. 289 (E.D. La. 1968)* *Choate* v. *Caterpillar Tractor Co.*, 402 F.2d 357 (7th Cir. 1968). The *Dent* case reversed one of the few district court decisions to reach an opposite conclusion, reported at 265 F. Supp. 56 (N.D. Ala. 1967), a decision which was much relied upon by the District Court and by the dissenting Circuit Judge in the

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* The opinions of the Fifth Circuit in *Dent* v. *St. Louis-San Francisco Ry. Co.*, and *Burrell* v. *Kaiser Aluminum & Chemical Co.*, are not yet officially reported. A copy of *Dent* is reprinted in the Appendix hereto at pp. 1a-11a, *infra*, and a copy of *Burrell* is reprinted in the Appendix hereto at pp. 12a-13a, *infra*.

instant case. The great majority of district court decisions are in accord with that of the Court of Appeals in the present case. *Mondy* v. *Crown Zellerbach Corp.*, 271 F. Supp. 258 (E.D. La. 1967); *Bowe* v. *Colgate-Palmolive Co.*, 272 F. Supp. 332 (S.D. Ind. 1967); *Moody* v. *Albemarle Paper Co.*, 271 F. Supp. 27 (E.D. N.C. 1967); *Evenson* v. *Northwest Airlines, Inc*, 268 F. Supp. 29 (E.D. Va. 1967); *Quarles* v. *Philip Morris, Inc.*, 271 F. Supp 842 (E.D. Va. 1967) and 279 F. Supp. 505 (E.D. Va. 1968); *Reese* v. *Atlantic Steel Co.*, 282 F. Supp. 905 (N.D. Ga. 1967); *Anthony* v. *Brooks*, 65 L.R.R.M. 3074 (N.D. Ga. 1967); *Sokolowski* v. *Swift and Co.*, 286 F. Supp. 775 (D. Minn. 1968); *Cox* v. *U.S. Gypsum Co.*, 284 F. Supp. 74 (N.D. Ind. 1968); *Harris* v. *Orkin Exterminating Co.*, 58 L.C. ¶ 9134 (N.D. Ga. 1968); *Pullen* v. *Otis Elevator*, 292 F. Supp. 715 (N.D. Ga. 1968); *Pena* v. *Hunt Tool Co.*, 58 L.C. ¶ 9123 (S.D. Tex. 1968); *Wheeler* v. *Bohn Aluminum & Brass Co.*, 58 L.C. ¶ 9137 (W.D. Mich. 1968); *Kendrick* v. *American Bakery Co.*, 58 L.C. ¶ 9146 (N.D. Ga. 1968); *Edwards* v. *North American Rockwell Corp.*, 58 L.C. ¶ 9153 (C.D. Calif. 1968); *Hayes* v. *Seaboard Coastline Railroad Co.*, 59 L.C. ¶ 9196 (S.D. Ga. 1969).

The only district court decision to the contrary which has not yet been reversed is *Mickel* v. *South Carolina State Employment Service*, 291 F. Supp. 910 (D.S.C. 1968), which is pending on appeal in the Fourth Circuit.

While the legislative history of the Act is, as the court below recognized, less than clear and consistent, it certainly does not compel a contrary construction. Overall, it supports the Court of Appeals' conclusion. Most of the statements cited to support the view that an effort by the Commission to conciliate is a prerequisite to the institution of suit were made at a time when the bill contemplated judicial enforcement by the Commission itself. The more per-

tinent statements made after the bill had been amended to its present form, which places the burden of enforcement on the alleged victim of discrimination rather than the Commission, support the view that "the Commission does not hold the key to the court room door." Statement by Senator Javits at 110 Cong. Rec. 14191 (June 17, 1964).

The language and the legislative history of the Act make it quite clear, and the Respondents certainly do not dispute, that Congress intended the Commission, if it found reasonable cause to believe that a charge of discrimination was true, to do what it could to correct the situation by conciliation and persuasion. They make it equally clear that persons aggrieved by discrimination must have recourse to the state and federal administrative remedies available to them before resorting to the judicial remedy granted by section 706(e). This was in fact the holding of *Mickel* v. *South Carolina State Employment Service,* 377 F.2d 239 (4th Cir. 1967), which the Petitioners wrongly describe as inconsistent with the Court of Appeals' decision in the present case. (Petition No. 981, p. 8.) But it is no less clear that Congress did not intend the extreme unfairness of depriving a victim of discrimination, who has exhausted the administrative remedies afforded him, of his judicial remedy because of a circumstance wholly beyond his control: the inability of the Commission to endeavor to effect conciliation. The Petitioners (Petition No. 981, p. 16; Petition No. 1000, pp. 13-14) seem to concede that, as Senator Javits said, "The Commission may find the claim invalid; yet the complainant can still sue." 110 Cong. Rec. 14191 (June 17, 1964). See also the remarks of Senator Morse, *Ibid.*; *Hall* v. *Werthan Bag Corporation,* 251 F. Supp. 184, 188 (M.D. Tenn. 1966). The Petitioners thus appear to make the preposterous contention that Congress denied the Commission power to deprive a complainant of judicial remedy by a

deliberate finding that his complaint lacked merit, but empowered it to achieve the same result by doing nothing.

Furthermore, the decisions below in which the Court of Appeals reversed the granting of motions to dismiss and ordered the cases remanded for trial are plainly interlocutory non-final judgments. While this Court plainly has the power to review non-final judgments of the federal courts, ". . . in the absence of some . . . unusual factor, the interlocutory nature of a lower court judgment will result in a denial of certiorari." Stern and Gressman, Supreme Court Practice (3rd ed. 1962), p. 150. "This court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Construction Co.* v. *Jacksonville, T.&K.R.Co.*, 148 U.S. 372, 384. See *Hamilton-Brown Shoe Co.* v. *United States,* 240 U.S. 251, 258 (lack of finality "of itself alone furnished sufficient ground for the denial"). These cases have none of the exceptional characteristics that might justify a review on certiorari at the present interlocutory stage.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted,

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